Reproductive Autonomy and Laws Prohibiting "Discriminatory" Abortions: Constitutional and Ethical Challenges

CAROLE J. PETERSEN*

I. INTRODUCTION

With the appointments of Associate Justices Gorsuch and Kavanaugh, it is increasingly likely that the U.S. Supreme Court will either overrule *Roe v. Wade*[1] or apply the "undue burden" test from *Planned Parenthood v. Casey*[2] in a less robust fashion. In either scenario, legislators who oppose abortion would have more leeway to restrict abortion. This Article analyzes a particularly controversial form of regulation, which ultimately may be reviewed by the United States Supreme Court. At least ten states have enacted laws prohibiting abortion when it is requested because of the sex, race, or disability of the fetus.[3] A federal Prenatal Nondiscrimination Act has also been proposed.[4] Legislators regularly use the discourse of equality to promote these laws, describing them as "anti-eugenic" measures to address the problem of discriminatory abortions.

In 2018, the Seventh Circuit upheld an injunction against Indiana's statute, which prohibits a doctor from performing an abortion if the woman

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* Professor, William S. Richardson School of Law and Matsunaga Institute for Peace, University of Hawaii at Manoa (carolep@hawaii.edu). This is a revised version of a paper presented on March 8, 2019 at Detroit Mercy Law Review's 2019 Symposium on *Women & the Law*. The author thanks the editors for editorial assistance. The research and professional travel that led to this article were supported by the William S. Richardson School of Law and the University of Hawaii at Manoa.

1. Roe v. Wade, 410 U.S. 113 (1973).

2. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

3. Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly, GUTTMACHER INST. (April. 1, 2019), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly (noting where enforcement has been temporarily or permanently enjoined by court order); in addition to the eight states listed on the chart, in 2019 Utah enacted a law prohibiting abortion when requested due to Down Syndrome and Kentucky enacted a law prohibiting abortion when sought due to the race, sex, national origin, or disability of the fetus. *See* Lindsay Whitehurst, *Utah Legislature Passes Down Syndrome Abortion Ban*, AP NEWS (Feb. 28, 2019), https://www.apnews.com/2e6e85b3a63042e9ad387ddaed6d58d6; Bruce Schreiner, *Federal Judge Blocks Second Kentucky Abortion Law in Days*, AP NEWS (Mar. 20, 2019), https://apnews.com/624e10af299b4b8f9c7ee15ddad14c09.

4. Prenatal Nondiscrimination Act (PRENDA) of 2017, H.R.147, 115th Congress (2017), *available at* https://www.congress.gov/bill/115th-congress/house-bill/147.

seeks the procedure solely because of the sex, race, or disability of the fetus.[5] However, four judges in the Seventh Circuit praised the statute and expressed their hope that the Supreme Court would hear the case.[6] Indiana filed its Petition for Certiorari on October 12, 2018, less than one week after Justice Kavanaugh's confirmation.[7] Eighteen other states and the governor of Mississippi joined an amici brief supporting the Petition.[8] Indiana urged the Court to hear the case, arguing that "the stakes are too high" to await further judgments in the lower courts.[9] Indiana also insisted that the Court could uphold the statute without overruling *Roe* or *Casey* because the issue of "discriminatory" abortion was not expressly considered in either case.[10]

On May 28, 2019, the Supreme Court issued its decision on Indiana's Petition, which some commentators have described as an "apparent compromise."[11] In a per curiam opinion, the Court upheld a statutory requirement that abortion providers bury or cremate fetal remains but denied the remainder of Indiana's Petition, expressing no views on the constitutionality of laws that prohibit abortions motivated by the sex, race, or disability of the fetus.[12] The Court observed that it was following its normal practice of denying a Petition when only one Court of Appeals has addressed the issue.[13] However, Justice Thomas wrote a lengthy concurring opinion defending Indiana's statute, insisting that "this law and other laws like it promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[14] While agreeing with his colleagues that it was appropriate

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5. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. St. Dep't of Health, 888 F.3d 300, 305–307 (7th Cir. 2018) (upholding injunction against Ind. Code §16-34-4-4–16-34-4-8; the court also upheld an injunction against provisions requiring fetal remains to be cremated or buried, which are not discussed in this article).

6. *Id.* at 310–317 (Manion, J., concurring in part and dissenting in part); *see also* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. St. Dep't of Health, 917 F.3d 532, 536–538 (7th Cir. 2018) (vacating decision of en banc review due to lack of majority) (Easterbrook, J., joined by Sykes, Barrett, and Brennan, JJ. dissenting from the denial of en banc review).

7. Petition for Writ of Certiorari, Comm'r of the Ind. St. Dep't of Health v. Planned Parenthood of Ind. & Ky., Inc., 888 F.3d 300 (No. 18-483) [hereinafter Petition].

8. *See* Brief of the States of Wisconsin, Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Governor Phil Bryant of the State of Mississippi as Amici Curiae Supporting Petitioners, Comm'r of Ind. St. Dep't of Health v. Planned Parenthood of Ind. & Ky., Inc., 888 F.3d 300 (No. 18-483) [hereinafter Brief of States Supporting Indiana].

9. Petition, *supra* note 7, at 22.

10. *Id.* at 26–30.

11. Adam Liptak, *Supreme Court Sidesteps Abortion in Ruling on Indiana Law*, N.Y. TIMES (May 28, 2019), https://www.nytimes.com/2019/05/28/us/politics/supreme-court-abortion-indiana.html.

12. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019) (per curiam).

13. *Id.*

14. *Id.* at 2 (Thomas, J., concurring).

to await further percolation in the lower courts, Justice Thomas predicted that the Court would soon have to confront the constitutionality of this type of regulation.[15] Indeed, a similar case is already pending in the Sixth Circuit, where Ohio has appealed an injunction against a statute prohibiting doctors from performing an abortion when a pregnant woman is even partly motivated by a fetal indication of Down syndrome.[16] If that case generates a conflict between circuits then the Supreme Court will almost certainly have to address it. The outcome could have profound effects on a woman's right to access abortion services.

Part II of this Article reviews the origins of this form of regulation and the role of "anti-eugenics" rhetoric in promoting it. This section of the article acknowledges that selective abortion is a painful subject, particularly for the disability rights movement. The medical profession should recognize an ethical duty not to promote disability-selective abortion when offering prenatal screening. But I also argue that the term "eugenic" should be reserved for state-sponsored laws and policies that seek to control reproduction and should not be used to describe an individual woman's decision to terminate a pregnancy.

Part III of the Article turns to the constitutional debate and demonstrates that Indiana's statute and laws similar to it could not be upheld without overruling the longstanding precedent established in *Roe* and refined in *Casey*. Contrary to what has been argued by Justice Thomas and certain judges in the Seventh Circuit, there is no reason to believe that the Justices who decided *Roe* and *Casey* were thinking only of those women who became pregnant accidentally. The text and context of the judgements demonstrate that the Justices were considering all women who seek abortions, including those who may have initially welcomed a pregnancy.

Part IV of the Article concludes by suggesting that legislators could adopt far less coercive measures to discourage sex-selective and disability-selective abortions. Although the United States has a significant body of anti-discrimination legislation, funding is grossly inadequate for inclusive education, which is essential for families rearing children with disabilities. The United States Senate should also ratify the Convention on the

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15. *Id.* at 4.

16. Preterm-Cleveland v. Himes, 294 F. Supp. 3d 746 (S.D. Ohio 2018), *appeal pending*, No. 18-3329 (6th Cir. April 12, 2018) (the District Court granted a preliminary injunction against Ohio Rev. Code § 2919.10(B), which prohibits any person from performing an abortion if the person has knowledge that the woman is seeking the abortion, in whole or in part, because of a test result indicating Down syndrome; a prenatal diagnosis of Down syndrome; or any other reason to believe that the fetus has Down syndrome). For commentary on the statute, *see* Marc Spindelman, *On the Constitutionality of Ohio's "Down Syndrome Abortion Ban,"* 79 OHIO ST. L. J. FURTHERMORE 19 (2018).

Elimination of All Forms of Discrimination Against Women ("CEDAW")[17] and the Convention on the Rights of Persons with Disabilities ("CRPD").[18] The monitoring bodies for these two treaties have also wrestled with the issue of selective abortion and have joined forces to address the systemic causes while also protecting women's right to reproductive autonomy.

II. EQUALITY AND ANTI-EUGENICS: THE NEW DISCOURSE OF THE ANTI-ABORTION MOVEMENT

The discourse of equality first entered the debate on abortion through the lens of gender equality. Steven Mosher, a leader in the anti-abortion movement, claimed that immigrants from Asia were bringing sex-selective abortion to the United States and that this phenomena could be exploited to help weaken support for abortion generally.[19] Mosher argued that the issue would "force supporters of abortion to publicly address a question that they will find profoundly disturbing: is the right to an abortion a license to destroy children for any and all reasons, including that of their sex?"[20] He predicted that feminists would defend abortion "with less conviction" when confronted by laws prohibiting sex-selective abortion.[21] Gradually, this strategy broadened to also include bans on abortion on the basis of the race or disability of the fetus.[22]

Mosher's strategy does not appear to have dampened feminist support for reproductive freedom. This may be because sex-selective abortion is far less common in the United States than portrayed by Mosher,[23] making it easier for pro-choice organizations to dismiss his articles as cynical tactics rather than a genuine effort to promote equality.[24] Indeed, it has been pointed

17. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted by G.A. and opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

18. Convention on the Rights of Persons with Disabilities, *adopted by G.A.* Dec. 13, 2006, 2515 U.N.T. S. 3 (entered into force May 3, 2008) [hereinafter CRPD].

19. Steven W. Mosher, *President's Page: Let Us Ban Sex-Selective Abortions,* POPULATION RESEARCH INSTITUTE (2007), https://www.pop.org/presidents-page-let-us-ban-sex-selective-abortions/.

20. *Id.*

21. *Id.*

22. *See generally* Justin Gillette, *Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 646 (2013); Carole J. Petersen, *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities,* 28 J. OF L. & HEALTH 121 (2015).

23. *See* Brian Citro et al., *Replacing Myths with Facts: Sex-Selective Abortion Laws in the United States,* CORNELL L. FAC. PUBL'N., Paper 1399, 7 (2014).

24. *Race and Sex Selective Abortion Bans: Wolves in Sheep's Clothing,* NAT'L ASIAN PAC. AM. WOMEN'S FORUM, https://www.napawf.org/uploads/1/1/4/9/114909119/prendais-suebrief_11.26-final.pdf (last updated July 2013).

out that laws prohibiting sex-selective abortion may tend to undermine equality by reinforcing racist stereotypes regarding Asian-Americans.[25]

Nonetheless, the idea of prohibiting selective abortion has found some support within the disability rights community, creating an unusual alliance between anti-abortion activists (who tend to be politically conservative) and certain disability rights advocates (who tend to be politically liberal).[26] This alliance is understandable given the history of eugenics, which provided the inspiration for many restrictions on reproduction by persons with disabilities. The word "eugenic" (derived from the Greek word for "well born") was originally coined by Francis Galton, one the founders of the English Eugenics Education Society.[27] Eugenics is a social philosophy that openly advocated for controlled breeding as a way to improve the quality of the population.[28] While many people associate eugenics with the racist ideology of Nazi Germany, eugenic theories have been influential in many countries and were commonly used to justify sterilization of persons with disabilities.[29] In 1927, the Supreme Court upheld Virginia's sterilization law with Justice Oliver Wendell Holmes famously proclaiming, "[t]hree generations of imbeciles are enough."[30] It was not until 1942 that the right to reproduce was recognized as a fundamental right in American constitutional law.[31]

More recently, *Roe* and the concept of reproductive freedom have been relied upon to assert a woman's right not to be sterilized or coerced into having an abortion.[32] Ironically, however, opponents of abortion have begun to accuse women who exercise that freedom as practicing "private eugenics" when they terminate a pregnancy due to some characteristic of the fetus.[33] In my view, this is an inappropriate use of the term "eugenics," which should be reserved for restrictions on reproduction imposed *upon* individuals by the

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25. *See A Win Against Racist, Sex–Selective Abortion Bans,* NAT'L ASIAN-PAC. AM. WOMEN'S FORUM, https://forwomen.org/grants-2/meet-our-grantees/grantee-profile-national-asian-pacific-american-womens-forum/ (last visited April 18, 2019); Jennifer M. Denbow, *Abortion as Genocide: Race, Agency, and Nation in Prenatal Nondiscrimination Bans,* 41 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 603, 603–626 (2016).

26. Stefanija Giric, *Strange Bedfellows: Anti–Abortion and Disability Rights Advocacy,* 3 J. OF L. & THE BIOSCIENCES 736, 736–742 (2016).

27. Ruth Hubbard, *Abortion and Disability: Who Should and Who Should Not Inhabit the World?*, THE DISABILITY STUDIES READER 74, 75 (4th ed. 2013).

28. *See generally* Frank Dikotter, *Race Culture: Recent Perspectives on the History of Eugenics*, 103 AM. HIST. REV. 467 (1998).

29. *See* Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 862–63 (2004).

30. Buck v. Bell, 274 U.S. 200, 20 (1927).

31. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

32. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 859 (1992).

33. *See, e.g.,* Brief Amicus Curiae of Pro-Life Legal Defense Fund et al. Supporting Petitioners, at 12, Comm'r of Ind. St. Dep't of Health v. Planned Parenthood of Ind. & Ky., Inc., 888 F.3d 300 (No. 18-483).

state or some other powerful institution. When an individual woman decides to terminate her own pregnancy, she weighs intensely personal factors and does not base her decision on some grand plan for improving the quality of the population.[34]

Those who use the term "eugenics" in the context of abortion are arguably on more solid ground when they examine the role of the medical profession, particularly in the era of expanded prenatal testing. Previously, invasive diagnostic tests—such as amniocentesis and chorionic villus sampling—were required to identify genetic anomalies. It is now possible to isolate cell-free fetal DNA in the mother's plasma, providing a reliable method of detecting chromosomal anomalies without the risk of miscarriage.[35] As a result, the American College of Obstetricians and Gynecologists ("ACOG") recommends that all pregnant women be offered prenatal diagnostic screening and testing, regardless of maternal age or other risk factors.[36] The ACOG's official position is that it only recommends screening be *offered* and that it is entirely up to the patient whether to accept screening.[37] However, from the perspective of many disability rights activists, even offering screening implicitly devalues the lives of persons with disabilities.[38] Although genetic counselors may try to be neutral and emphasize patient autonomy, there is always the risk that eugenic views will be conveyed to prospective parents.[39] As there is no treatment for chromosomal anomalies, women will likely assume the reason screening is offered is to allow for an early abortion if a genetic condition is revealed; this is borne out by the

34. *See generally* RAYNA RAPP, TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA (1999) (includes extensive interviews chronicling the experiences of women, including those who refused prenatal testing and those who received a diagnosis of fetal impairment and struggled with the decision as to whether to continue the pregnancy).

35. Vardit Ravitsky, *The Shifting Landscape of Prenatal Testing: Between Reproductive Autonomy and Public Health*, 47 JUST REPRODUCTION: REIMAGINING AUTONOMY IN REPROD. MED. S34 (2017).

36. Mark W. Leach, *ACOG Issues New Prenatal Testing Guidelines*, PRENATAL INFORMATION RESEARCH CONSORTIUM (April 29, 2016), https://prenatalinformation.org/2016/04/29/acog-issues-new-prenatal-testing-guidelines/.

37. *See* Giric, *supra* note 26 (discussing a statement issued by the ACOG following release of its 2007 guidelines).

38. Janet E. Lord, *Screened Out of Existence: The Convention on the Rights of Persons with Disabilities and Selective Screening Policies*, 12 INT'L J. DISABILITY, CMTY., & REHAB. (2013); *see also* Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 FLA ST. U. L. REV. 315, 315–16 (2003).

39. *See* Marsha Saxton, *Disability Rights and Selective Abortion*, THE DISABILITY STUDIES READER 87, 93 (4th ed. 2013) (noting that pregnant women may feel that it is their duty to save society's resources by having an abortion after prenatal testing reveals a fetal impairment).

statistics.[40] For example, recent studies of Down syndrome, one of the most frequently occurring genetic conditions,[41] report a termination rate between 67% and 85% in the United States.[42] Some women have also reported that they felt a certain pressure to abort after they were given test results revealing Down syndrome.[43] The media also tends to portray disability in a fairly negative light and often presents the decision to abort in situations of fetal impairment as "a matter of fact issue, with little regard to the controversy that might be embedded in such a position."[44]

It is therefore important to develop ethical and policy-based standards to ensure that prenatal screening and testing programs do not send, intentionally or unintentionally, offensive eugenic messages.[45] If testing indicates a likely fetal impairment, then the pregnant woman should have an opportunity to consult with individuals and families living with a particular condition regarding the challenges and opportunities of living with a particular impairment. It is also important for feminists to work together with disability rights advocates to ensure that "pro-choice" campaigns do not encourage disability-selective abortions or assume that this will be the "choice" made by women when they receive a diagnosis of fetal impairment.[46]

On the other hand, it is also important that the discourse of disability rights not be used to pressure women or to deny them access to information. There are some signs of this in the United Kingdom, where a campaign entitled "Don't Screen Us Out" was launched to argue against public funding for prenatal testing on the basis that approximately 90% of British women who receive a diagnosis of Down syndrome would elect to terminate their pregnancies.[47] An international network known as "Saving Downs" has also been established to lobby for changes to screening programs.[48] Saving

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40. *See* Kenneth B. Schechtman et al., *Decision-Making for Termination of Pregnancies with Fetal Anomalies: Analysis of 53,000 Pregnancies*, 99 OBSTETRICS & GYNECOLOGY 216, 216 (2002).

41. *See* Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995–2011)*, 32 PRENATAL DIAGNOSIS 142, 142 (2012).

42. *Id.* at 152.

43. Alison Piepmeier, *The Inadequacy of "Choice:" Disability and What's Wrong with Feminist Framings of Reproduction*, 39 FEMINIST STUD. 159, 168–176, 175 (2013) (discussing interviews with women who decided not to abort despite indications of Down syndrome).

44. Carol Bishop Mills & Elina Erzikova, *Prenatal Testing, Disability, and Termination: An Examination of Newspaper Framing*, 32 DISABILITY STUD. Q. (2012).

45. *See, e.g.*, Ravitsky, *supra* note 35.

46. There is evidence that the reproductive rights movement is making that effort. *See, e.g.*, CTR. FOR REPROD. RTS., SHIFTING THE FRAME ON DISABILITY RIGHTS FOR THE U.S REPRODUCTIVE RIGHTS MOVEMENT (March 2017), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Disability-Briefing-Paper-FINAL.pdf.

47. *Harms to Babies with Down's Syndrome & the Down's Syndrome Community*, DON'T SCREEN US OUT, http://dontscreenusout.org/ (last visited April19, 2019).

48. *About Us: Our Mission and What We do*, SAVE DOWN SYNDROME, https://www.savedownsyndrome.com/aboutus (last visited April 19, 2019).

Downs contends that prenatal tests must "respect the life and integrity of the unborn child, cause no harm, be only directed towards safeguarding or healing the unborn child and be presented in a way that does not discriminate against people with Down syndrome."[49] Similarly, some advocates in the United States believe that doctors should be required to communicate a positive view of what it is like to rear a child with Down syndrome.[50] These campaigns are problematic, both for the doctor-patient relationship and for a woman's right to receive full and unbiased information. A woman's right to receive full and unbiased information is particularly important when testing reveals a fetal impairment that could cause significant physical pain or lead to an early death.[51]

In any event, in the midst of this highly contentious debate, it is not surprising that the anti-abortion movement would use the spectrum of "eugenic abortion" to justify new restrictions or that certain disability rights organizations would support these laws.[52] The next section of the Article thus turns to Indiana's argument that its statute is a "qualitatively new" type of regulation,[53] which could be upheld without overruling *Roe* or *Casey*.

III. THE CONSTITUTIONAL ARGUMENT AND THE FUTURE OF *ROE* AND *CASEY*

Justice Anthony Kennedy's retirement in 2018 renewed the debate on the future of abortion in U.S. constitutional law. He provided the deciding vote in *Casey*, which was, at the time, widely perceived as saving *Roe* from being overruled. More recently, Justice Kennedy voted with the majority in *Whole Women's Health v. Hellerstedt,* which held that state regulations that are ostensibly enacted to protect women's health need to offer tangible benefits sufficient to justify the additional burdens they place on women seeking abortions.[54]

Some politicians have predicted that *Roe* will be overturned now that Justice Brett Kavanaugh has replaced Justice Kennedy.[55] However, other

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49. *Id.*

50. *See* Giric, *supra* note 26, at 740 (critiquing Pennsylvania's law Down Syndrome Prenatal Education Act, which was passed in 2014 at the request of a father of a child with Down syndrome who thought that abortions of fetuses at risk of having Down syndrome reflected a lack of positive information on what it is like to raise a child with the condition).

51. Ellen Painter Dollar, *Why Prenatal Screening for Gender and for Disabilities are Not the Same*, PATHEOS (Jan. 25, 2012), http://www.patheos.com/blogs/ellenpainterdollar/2012/01/why-prenatal-screening-for-gender-and-for-disabilities-are-not-the-same/.

52. *See* Brief for Foundation Jerome Lejeune et al. as Amici Curiae Supporting Petitioners, Ind. St. Dep't of Health v. Planned Parenthood of Ind. & Ky., Inc., 888 F.3d 300 (No. 18-483).

53. Petition, *supra* note 7, at 14.

54. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318–2321 (2016).

55. *See, e.g.* Michael Burke, *Cuomo: Kavanaugh, Gorsuch are "going to reverse Roe v. Wade,"* THE HILL, (Jan. 7, 2019), https://thehill.com/policy/healthcare/424192-cuomo-

commentators believe that Chief Justice John Roberts will be reluctant to overrule such a longstanding precedent and that the Court will instead "chip away" at the right to abortion by upholding a wider range of state regulations.[56] This is what makes statutes prohibiting "discriminatory" abortion so interesting—proponents have argued that it would not be necessary to overrule *Roe* or *Casey* in order to uphold the regulation.[57] This section of the Article analyzes that argument, which received support from certain judges in the Seventh Circuit and also from Justice Thomas' recent concurring opinion.[58]

The relevant provisions in Indiana's statute would have prohibited abortions at any time, including prior to viability, if the doctor knows that the pregnant woman is seeking an abortion: (1) solely because of the sex of the fetus;[59] or (2) solely because the fetus has been diagnosed with Down syndrome or has a potential diagnosis of Down syndrome, or has been diagnosed or has a potential diagnosis of "any other disability," with exceptions for disabilities that will, with reasonable certainty, result in death within three months of birth; [60] or (3) solely because of the race, color, national origin, or ancestry of the fetus.[61]

When these provisions were challenged by Planned Parenthood in *Planned Parenthood of Indiana v. Commissioner*, the District Court granted a motion for summary judgment and entered an injunction.[62] On appeal, Indiana argued that the statute could be reconciled with *Casey* because *Casey* only reaffirmed a woman's right to make a binary choice of whether or not to have a child and not the right to terminate a particular pregnancy.[63] The Seventh Circuit rejected this argument, citing the holding from *Casey* that "a State *may not prohibit* any woman from making the ultimate decision to terminate her pregnancy *before viability*."[64] However, Judge Manion wrote a

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kavanaugh-gorsuch-are-going-to-reverse-roe-v-wade (quoting New York Governor Andrew Cuomo).

56. Li Zhou, *10 Legal Experts on the Future of Roe v. Wade after Kennedy,* VOX (July 2, 2018), https://www.vox.com/2018/7/2/17515154/kennedy-retirement-roe-wade.

57. Petition, *supra* note 7, at 26-30.

58. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019) (Thomas, J. concurring).

59. IND. CODE ANN. §§ 16-34-4-4, 16-34-4-5 (LexisNexis 2019).

60. *Id.* at §§ 16-34-4-6, 16-34-4-7 (LexisNexis 2019).

61. *Id.* at § 16-34-4-8 (LexisNexis 2019).

62. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. St. Dep't of Health, 265 F. Supp. 3d 859, 873 (S.D. Ind. 2017).

63. Planned Parenthood of Ind. & Ky., Inc., v. Comm'r of Ind. St. Dep't of Health 888 F.3d 300, 306 (7th Cir. 2018), *vacated*, 917 F.3d 532 (7th Cir. 2018), *cert. granted in part, judgment rev'd in part sub nom*; Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019) (noting that Indiana "creatively suggests that Casey only reaffirmed a woman's 'binary choice' of whether or not to have a child prior to viability").

64. *Id.* at 305 (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992) (emphasis added by the 7th Cir.).

lengthy separate opinion, arguing that Indiana's theory of a binary right "makes sense" and invited the Supreme Court to take the case.[65] Judge Manion also complained that the right to have a pre-viability abortion had, in his opinion, evolved into a "super-right" with an effects test that is more difficult to satisfy than strict scrutiny.[66] He further opined that Indiana's law could survive strict scrutiny because the nondiscrimination provisions were "narrowly tailored to target invidious discrimination" and that Indiana had a compelling interest in attempting to prevent this type of "private eugenics."[67] Judge Manion concluded that the case "begs for the Supreme Court to reconsider *Roe* and *Casey*" or, in the alternative, to "downgrade abortion to the same status as actual constitutional rights" so that states could justify restrictions by demonstrating a compelling need to prevent discriminatory abortions.[68]

Indiana then requested *en banc* review in the Seventh Circuit (with respect to the provisions relating to disposition of fetal remains), which was denied.[69] What is striking, however, is the separate dissenting opinion of Judge Easterbrook, which was joined by three additional judges in the Seventh Circuit. Although Indiana had not even requested *en banc* review of the nondiscrimination provisions, Judge Easterbrook took the opportunity to dispute the panel's conclusion that *Casey* required the court to uphold the injunction. He wrote:

> *Casey* and other decisions hold that, until a fetus is viable, a woman is entitled to decide whether to bear a child. But there is a difference between "I don't want to bear a child" and "I want a child but only a male" or "I want only children whose genes predict success in life." Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* decided. None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children ... We ought not to impute to the Justices decisions they have not made about problems they have not faced.[70]

Judge Easterbrook's opinion featured prominently in Indiana's Petition for Certiorari. The Petition described the nondiscrimination provisions as representing "a qualitatively new type of abortion statute that responds to new technological developments allowing women to make a choice not

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65. *Id.* at 310–321 (Manion, J., concurring in part and dissenting in part).

66. *Id.* at 311.

67. *Id.*

68. *Id.* at 313.

69. The vote, which was initially in favor of *en banc* review, became tied after the recusal of one judge and the petition was therefore denied. *See* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. St. Dep't of Health, 917 F.3d 532, 536–538 (7th Cir. 2018).

70. *Id.* at 536–538 (Easterbrook, J., joined by Sykes, Barrett, and Brennan, JJ. dissenting from the denial of en banc review).

contemplated at the time of [*Roe or Casey*]: the choice of which child to bear."[71] Indiana insisted that this type of regulation "neither implicates the concerns underlying *Roe and Casey* nor burdens the right those cases ultimately protect."[72] Rather, the Petition argued, the statute was intended to regulate "women who have already made the decision 'to bear or beget a child' but simply do not want to bear a particular child."[73] The amici brief submitted by the 18 states supporting Indiana also quoted liberally from Judge Easterbrook's dissenting opinion.[74]

Similarly, in the Sixth Circuit, attorneys for Ohio have relied upon Justice Easterbrook's dissent in their appeal of a preliminary injunction against a statute that prohibits abortion if the woman's decision is due to a fetal indication of Down syndrome. During oral arguments before the Sixth Circuit, Ohio's attorneys acknowledged that overturning the injunction would create a conflict with the Seventh Circuit and they urged the judges to go ahead and create that conflict.[75] A conflict between circuits would, of course, increase the likelihood of the Supreme Court eventually reviewing the constitutionality of this type of statute.

The question then is whether a majority of the Supreme Court would accept the argument made by Indiana and Ohio. In my view it could not do so without either overruling or greatly limiting the precedents set in *Roe* and *Casey*. It is simply not credible to argue that the Justices who decided *Roe* were thinking *only* of women who accidentally become pregnant. The judgment in *Roe* contains a detailed comparative discussion of abortion law and the reforms that were gradually being adopted in various jurisdictions. The author of the opinion, Justice Harry Blackman, had researched both the medical and legal history of abortion and was clearly aware of the trends in law reform.[76] At that time, proponents of reforms often cited the risk of fetal impairments—whether due to genetic anomalies, rubella infection, or exposure to certain drugs—as one of the reasons why a woman might decide to seek an abortion.[77] Indeed, the judgment expressly mentions statutes that provided exceptions for this situation. For example, the judgment quotes from a British statute adopted in 1967, which permitted abortion where two doctors certified that, "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously

71. Petition, *supra* note 7, at 14.

72. *Id.* at 29–30.

73. *Id.* at 30.

74. Brief of States Supporting Indiana, *supra* note 8, at 11–15.

75. Preterm–Cleveland v. Himes, 2019 U.S. App. LEXIS 7016 (6th Cir. March 7, 2019) (No. 18-3329) (argument heard on January 30, 2019), http://www.opn.ca6.uscourts.gov/internet/court_audio/aud1.php.

76. Roe v. Wade, 410 U.S. 113, 117 (1973).

77. Mary Ziegler, *The Disability Politics of Abortion,* 2017 UTAH L. REV. 587, 593 (2017).

handicapped."[78] The Court also cited Section 230.3 of the American Law Institute's Model Penal Code,[79] and the Uniform Abortion Act, which had been drafted and approved by the Conference of Commissioners on Uniform State Laws in 1972.[80] Both of these model statutes categorized a "substantial risk" that the child would be born with a "grave physical or mental defect" as one of the situations in which abortion would be permitted.[81] As a result, by the time *Roe* was decided, a number of states allowed women to obtain an abortion in cases of fetal impairment, albeit often with onerous procedural requirements.[82] Indeed, Georgia's statute—which was declared unconstitutional in *Doe v. Bolton,* the companion case to *Roe*—fell in that category because it permitted abortion when a doctor determined that the fetus was likely to be born with a "grave, permanent, and irremediable mental or physical defect."[83] The Supreme Court considered this statute carefully and declared it unconstitutional, finding that the procedural hurdles were unduly restrictive of women's constitutional rights.[84]

In light of this history, there is no doubt that the Supreme Court was *aware* that some women were seeking abortions due to a fear of a fetal impairment. Neither the opinion in *Roe* or *Doe v. Bolton* addressed this category of women separately from women who simply did not want to be pregnant, rendering the opinions consistent with the Court's ultimate conclusion: a woman's right to terminate her pregnancy before viability is firmly rooted in the Fourteenth Amendment's right to privacy. Thus, a state does not have the right to pass judgment on a woman's reasons for seeking an abortion in the early stages of pregnancy. This is the key difference between the U.S. constitutional framework and legal systems that require a woman to demonstrate that her reasons fall within a statutory exception to a general ban on abortion.[85]

Two decades later, in *Casey*, the Court recognized that *Roe's* trimester framework was problematic but expressly reaffirmed what it described as the essential holding from *Roe*: the "right of a woman to choose to have an

78. Roe v. Wade, 410 U.S. at 137–138 (citing Abortion Act of 1967, 15 & 16 Eliz. 2 c. 87 (Eng.)).

79. *Id.* at 140.

80. *Id.* at 146.

81. *Id.* at note 40; MODEL PENAL CODE § 230.3 (AM. LAW INST. 1962).

82. *See* LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 272 (2012) (describing the American Law Institute's model statute and noting that a majority of Americans then supported abortion in situations of "grave physical or mental defect" of the fetus).

83. Doe v. Bolton, 410 U.S. 179, 183 (1973).

84. *Id.* at 195–202 (describing procedural hurdles, including the need for two other doctors to concur in the first doctor's finding and for approval by a hospital committee).

85. *See* Carole J. Petersen, *Reproduction and Family Planning: Individual Right or Public Policy?, in* HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY, 261–305 (Raymond Wacks, ed., Hong Kong University Press, 1993) (contrasting the legal framework of Hong Kong, the United States, and selected European nations).

abortion before viability and to obtain it without undue interference from the State."[86] States may take steps to ensure that the decision is "thoughtful and informed" and so a requirement that a doctor obtain a woman's consent at least 24 hours before the procedure was upheld.[87] States may also enact regulations designed to inform women that "there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself."[88] But *Casey* was exceedingly clear that a state may not prohibit any woman from making the ultimate decision on whether to abort a pregnancy before viability.[89] It is important to note that by this time in the early 1990s, the Court had considered additional cases in which the issue of fetal disability had been raised and thus the Justices were clearly aware that this could be the motivation for seeking an abortion.[90]

It is also clear that the Justices in *Casey* had thought about the relationship between eugenics and reproductive freedom. In explaining their decision to uphold *Roe,* the Justices observed:

> If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in Roe the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet Roe has been sensibly relied upon to counter any such suggestions. E.g., Arnold v. Board of Education of Escambia County, Ala., 880 F.2d 305, 311 (CA11 1989) (relying upon Roe and concluding that government officials violate the Constitution by coercing a minor to have an abortion); Avery v. County of Burke, 660 F.2d 111, 115 (CA4 1981) (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait).[91]

The decision to cite to these cases demonstrates that the Court viewed a woman's constitutional right to privacy as providing protection against eugenic policies. It would be a huge leap for the Court to accept Indiana's argument that a woman practices a form of eugenics when she exercises her right to privacy and decides to terminate her pregnancy for personal reasons.

Indiana made one additional argument in support of its claim that the statute does not violate *Casey*—that a ban on discriminatory abortion is

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86. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion).

87. *Id.*

88. *Id.*

89. *Id.* at 879.

90. *See e.g.* Colautti v. Franklin, 439 U.S. 379, 389 note 8 (1979) (discussing evidence that medical technology makes it possible to detect whether a fetus has a disorder); Harris v. McRae, 448 U.S. 297, 340 (1980) (Marshall, J., dissenting) (noting that federal funding was unavailable even when it was known that the fetus would suffer an early death if carried to term).

91. *Casey*, 505 U.S. at 859.

comparable to a ban on partial birth abortion, which was upheld in *Gonzalez v. Carhart*.[92] Of course, the two statutes are quite different: *Gonzales* involved a federal statute banning a particular method of abortion[93] whereas Indiana's statute purported to ban abortion when it is sought for particular reasons. The Petition for Certiorari suggested that the two cases are analogous because Indiana's statute also "does not attempt to replace viability with some other temporal re-definition of the right not 'to bear or beget a child.'" Instead, the Indiana statute purported to ban abortion based on ancillary overriding justifications not expressly considered in *Roe* or *Casey*, just like the ban on partial-birth abortion upheld in *Gonzales*.[94] Amici briefs submitted in support of Indiana also relied upon *Gonzales*. In essence, this line of argument invited the Court to hold that the viability line recognized in *Casey* need not be applied when the state is asserting an interest other than the potential life of a particular fetus. As one amici brief argued, "the Court could uphold a prohibition on the eugenic practice of Down syndrome discrimination abortion without disturbing the general rule of viability set out in *Roe* and *Casey*."[95]

If the Court were to accept this theory, then it might conceivably recognize that different state interests—such as an interest in protecting persons living with disabilities from receiving the message that they are unworthy of life or an interest in preventing the elimination of certain classes of people—are both "compelling" and exempt from the viability line because they can only be pursued by a law prohibiting certain abortions from the moment of conception.

While these are creative arguments, in my view it would not be possible to uphold Indiana's statute without overruling *Casey*.[96] Even if the Court were to accept that the viability rule need not be applied to a statute prohibiting "discriminatory" abortion, it would still have to acknowledge that it is an enormous restriction on a woman's personal liberty to insist that she carry a pre-viability pregnancy to term in order to help a state fulfill certain broad social goals. It is one thing to tell an employer or an educational institution that it cannot treat persons differently based on sex, race, or disability—an analogy that proponents of Indiana's law often try to make—but it is quite

92. Gonzales v. Carhart, 550 U.S. 124 (2007).

93. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2003).

94. Petition, *supra* note 7, at 29.

95. *See* Brief for Amicus Curiae Susan B. Anthony List in Support of Petitioners, Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. St. Dep't of Health, 917 F.3d 532 (7th Cir. 2018) (although the Susan B. Anthony list opposes abortion generally, it has devoted this brief to what it refers to as "the eugenic practice of Down Syndrome discrimination abortion").

96. *See* Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly?: Examining the Potential for Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20 MICH. J. GENDER & L. 291 (2013) (analyzing why a proposed federal law prohibiting disability-selective abortion would also be unconstitutional).

another to insist that a woman must give birth to a particular fetus in order to support a state's goal of equality. As observed in *Casey*, a woman who carries a pregnancy to term is subject to anxieties, physical constraints, and pain that only she must bear.[97] This is even more true if the pregnant woman knows that her future child will have an impairment—perhaps one that will cause great suffering or death in early childhood.[98] Laws prohibiting pre-viability abortions—which is what Indiana and numerous states that support it seek to enforce—would thus put the liberty of a pregnant woman at stake in a sense that is "unique to the human condition."[99] Indeed, one might argue that it would be "eugenic" for the state of Indiana to require individual women to lend their wombs to the state in order to advance its purported state interest in promoting equality and respect for persons with disabilities. The impact of this coercion would, of course, fall disproportionately on low-income women because women with assets can travel to states with more liberal laws to obtain abortions.

Moreover, as demonstrated in the final section of the Article, there are far less coercive means of achieving the state interests that have been asserted by Indiana.

IV. PROMOTING EQUALITY WITHOUT COERCION

The World Health Organization and other international agencies have long agreed that the most effective way to discourage sex-selective abortion is to remedy sex discrimination, which is the underlying cause of male preference within families.[100] Similarly, disability rights advocates recognize the overriding importance of removing barriers and reducing discrimination, thus making the prospect of parenting a child with a disability less daunting.

In recent decades, the United States has enacted a body of legislation to promote the rights of persons with disabilities, including the Americans with Disabilities Act ("ADA")[101] and the Individuals with Disabilities Education

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97. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion).

98. The only exception to Indiana's ban on disability-based abortions was for disabilities that would, with reasonable medical certainty, result in death within three months of birth; thus it sought to require the woman to carry a pregnancy to term even when the fetus has a genetic disorder that will cause death in early childhood. Ind. Code Ann. §§ 16-34-4-1(b), 35-46-5-3(a) (West 2016).

99. *Casey*, 505 U.S. at 852.

100. WORLD HEALTH ORG. ET AL., PREVENTING GENDER-BIASED SEX SELECTION: AN INTERAGENCY STATEMENT, WORLD HEALTH ORGANIZATION 10 (2011), http://www.ohchr.org/Documents/Issues/Women/WRGS/PreventingGenderBiasedSexSelection.pdf (recommending systemic changes to reduce son preference but also cautioning that efforts to manage or limit sex selection should also not hamper or limit access to safe abortion services).

101. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (amended 2009) (the ADA was amended by the Americans with Disability Act Amendments Act of 2008, Pub.

Act ("IDEA").[102] The IDEA legislation is particularly important because it theoretically guarantees a "free appropriate education" in the most inclusive environment possible, putting an end to an era when children with disabilities were routinely segregated and given little meaningful education.[103] However, it is well known that inclusive education—still referred to as "special education" in the United States—is grossly underfunded.[104] As a result, many parents of children with disabilities feel compelled to litigate in order to secure the education to which their children are entitled.[105] Parents also worry about whether a child with an impairment will be able to obtain employment and live independently as an adult.[106] Given the high rate of unemployment among persons with disabilities, this is a very understandable concern.[107] Publicity regarding these concerns and other examples of disability discrimination naturally increase a prospective parent's apprehension and therefore encourages disability-selective abortion.[108] As such, the federal and state governments need to increase funding for inclusive education and work to expand employment opportunities for persons with disabilities.

It is also time for the United States to ratify both CEDAW and the CRPD. Although the enforcement processes for human rights treaties are notoriously soft, both treaties could provide advocacy tools for those seeking better funding and implementation of the laws prohibiting discrimination. The United States signed the CRPD in 2009, during the administration of President Obama, and came very close to ratifying the treaty in 2012.[109] The

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L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101 (2009) and 29 U.S.C. § 705 (2009))).

102. Individuals with Disabilities Education Act, 20 U.S.C § 1400 *et seq.* (2004).

103. *See generally,* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 364–66 (1990).

104. *See, e.g.* National Council on Disability, *Broken Promises: The Underfunding of IDEA* (Feb. 7, 2018).

105. *Id.* at 35–36 (reporting an increase in complaints from parents regarding the failure to provide children with disabilities with a free appropriate education in an inclusive environment); Christopher Thomas Leahy & Michael A. Mugmon, *Allocation of the Burden of Proof in Individuals with Disabilities Education Act Due Process Challenges*, 29 VERMONT L. REV. 951 (2009) (analyzing the difficulties parents face when filing complaints on behalf of their children).

106. Chris Kardish, *Hidden or Unemployed: America's Failure to Get Disabled People Jobs*, GOVERNING (June 2015), https://www.governing.com/topics/mgmt/gov-american-disabilities-act-compliance.html.

107. *See, e.g.* BROOKINGS INST., *People with Disabilities are Disproportionately Among the Out-of-Work*, THE AVENUE (June 30, 2017), https://www.brookings.edu/blog/the-avenue/2017/06/30/people-with-disabilities-are-disproportionately-among-the-out-of-work/.

108. *See* Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act,* 2009 UTAH L. REV. 846, 863 (2009).

109. For discussion of the failure of the United States to ratify the treaty in 2012, *see* Carole J. Petersen, *The Convention on the Rights of Persons with Disabilities: Using International Law to Promote Social and Economic Development in the Asia Pacific,* 35 U. HAW. L. REV. 821 (2013).

ratification effort was truly bipartisan (led by Senators John McCain and John Kerry) and could be revived if a few more Republican Senators would agree to support it.

The overall purpose of the CRPD is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[110] CRPD also marks a "paradigm shift" because it rejects the outdated medical and social welfare models of disability and embraces the social model, which emphasizes the right to make one's own decisions and fully participate in society.[111] Yet, the treaty also acknowledges that some persons living with impairments require significant services and support in order to live with dignity.[112] The CRPD therefore takes a holistic approach to rights and rejects the traditional dichotomy between civil liberties and economic, social, and cultural rights.[113]

Further, the CRPD is relevant to the issue of disability-selective abortion. The issue came up during the drafting of several provisions in the treaty, including Article 10 (right to life), Article 23 (condemning state-sponsored sterilization), and Article 25 (equal access to sexual and reproductive health services).[114] The *travaux preparatoire* reveal a vigorous debate on the wording of these provisions.[115] The Holy See (which participated but ultimately decided not to sign the treaty) objected to references to "sexual and reproductive health" services, arguing that they could be interpreted to include abortion services.[116] In order to address this objection and other concerns regarding disability-selective abortion, a working group submitted a proposal for defining the "right to life."[117] The proposed text stated that "[d]isability is not a justification for the termination of life" and that States

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110. CRPD, *supra* note 18, at art. 1.

111. *See* Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287 (2007); Rosemary Kayess & Phillip French, *Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1 (2008).

112. *See, e.g.* Theresia Degener, *Disability in a Human Rights Context*, *in* DISABILITY HUMAN RIGHTS LAW 2018 (Dr. Anna Arstein-Kerslake ed., 2018); Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75 (2007).

113. Frédéric Mégret, *The Disabilities Convention: Towards a Holistic Concept of Rights*, 12(2) INT'L J. OF HUM. RTS. 261 (2008).

114. CRPD, *supra* note 18, at arts. 10, 23, 25.

115. *See* Mi Yeon Kim, *Women with Disabilities*, *in* HUMAN RIGHTS AND DISABILITY ADVOCACY 113, 123 (Maya Sabatello and Marianne Schulze, eds., 2014); Marta Schaaf, *Negotiating Sexuality in the Convention on the Rights of Persons with Disabilities*, 8 SUR. INT'L J. HUM. RTS. 113, 113 (2011).

116. Schaaf, *supra* note 115, at 123. For further discussion of the Holy See's position on international instruments that address reproductive rights, *see* Chad Marzen, *The Holy See's Worldwide Role and International Human Rights: Solely Symbolic?*, 27 U. DET. MERCY L. REV. 659 (2009).

117. Lex Grandia, *Imagine: To Be a Part of This*, *in* HUM. RTS. AND DISABILITY ADVOCACY 146, 152 (Maya Sabatello and Marianne Schulze, eds., 2014).

Parties to the treaty "shall undertake effective measures to the prohibition of compulsory abortion at the instance of the State based on the prenatal diagnosis of disability."[118] However, this language proved controversial because none of the previous United Nations ("UN") human rights treaties have endowed the fetus with rights.[119] Ultimately, the drafters of the CRPD agreed that Article 10 would simply protect the right to life and not refer to the unborn or state that life begins at conception.[120]

The drafters of the CRPD also considered whether it was possible to create at least a minimal duty for governments to encourage prospective parents not to terminate a pregnancy because of disability.[121] A coalition of Australian disability rights groups made the following suggestion:

> This [issue] obviously presents a difficult ethical challenge, not least because of its potential impact on the choice of women in relation to pregnancy. However, it might be possible to address this issue more indirectly. For example, much of the information that is made available to parents at the time of genetic testing and immediately following the birth of a child with disability is overwhelmingly negative and inaccurate, and induces parents to opt for termination of pregnancy or withdrawal of life-sustaining treatments. It is possible to impose an obligation on States to ensure that prospective parents of a child with disability receive positive and realistic orientation to their child and its future life. This may reduce the chances that parents will opt for termination of pregnancy.[122]

This language is comparable to what some disability rights organizations, such as Saving Downs, are advocating for at the domestic level. However, the idea of imposing an obligation on governments to give prospective parents a positive view of what it would be like to rear a child with a disability also proved controversial and as such, the proposal was abandoned.[123]

Nevertheless, the drafters did retain the language relating to the right of persons with disabilities to access reproductive health services.[124] The right to decide on the number and spacing of children was first stated in Article 16 of CEDAW and also appears in the CRPD.[125] However, the language in

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118. *Id.*

119. *See generally* Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights,* 13 REPROD. HEALTH MATTERS 120, 122 (2005).

120. Grandia, *supra* note 117.

121. U.N. Convention on the Rights of People with Disabilities, Fourth Session of the Ad Hoc Committee, Daily Summary of Discussions Related to Article 8: Right to Life, (Aug. 25, 2004) [hereinafter Right to Life Discussion], http://www.un.org/esa/socdev/enable/rights/ahc4sumart08.htm.

122. U.N. Convention on the Rights of People with Disabilities, Proposals and Amendments Submitted Electronically, Fourth Session Comments by People with Disability Australia (2006), http://www.un.org/esa/socdev/enable/rights/ahcstata11fscomments.htm.

123. *See* Right to Life Discussion, *supra* note 121.

124. CRPD, *supra* note 18, at art. 25.

125. *Id.* at art. 23.

the CRPD is stronger because it provides that governments should ensure that "[t]he rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided."[126] This provision was considered a breakthrough because persons with disabilities are too often assumed to be sexually passive with no intimate relationships. In fact, many persons with disabilities are sexually active and want the ability to control their fertility.[127]

The CRPD has now been in force for 10 years and the issue of disability-selective abortion has resurfaced, primarily when the Committee on the Rights of Persons with Disabilities has reviewed government reports. For example, Spain—the second country to be reviewed by the Committee—was asked to explain why the legal period for abortion was longer in cases of fetal impairment. Not receiving a satisfactory answer, the Committee included the following, somewhat cryptic, statement in its Concluding Observations on Spain's Initial Report:

> The Committee takes note of Act 2/2010 of 3 March 2010 on sexual and reproductive health, which decriminalizes voluntary termination of pregnancy, allows pregnancy to be terminated up to 14 weeks and includes two specific cases in which the time limits for abortion are extended if the foetus has a disability: until [twenty-two] weeks of gestation, provided there is "a risk of serious anomalies in the foetus", and beyond week [twenty-two] when, inter alia, "an extremely serious and incurable illness is detected in the foetus". The Committee also notes the explanations provided by the State party for maintaining this distinction. The Committee recommends that the State party abolish the distinction made in Act 2/2010 in the period allowed under law within which a pregnancy can be terminated based solely on disability.[128]

The following year, the Committee made similar comments on Hungary's Initial Report.[129] However, in some ways, the Committee's comments to the Hungarian government were even stronger because it expressly

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126. *Id.* at art. 23(1)(b) (in contrast, the CEDAW treaty only provides (at art. 16) that women should have equal rights with men to determine the number and spacing of their children).

127. *See* WORLD HEALTH ORGANIZATION & UNITED NATIONS POPULATION FUND, PROMOTING SEXUAL AND REPRODUCTIVE HEALTH FOR PERSONS WITH DISABILITIES 7 (2009); Michael L. Perlin & Alison J. Lynch, *All His Sexless Patients: Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 258 (2014).

128. Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities Spain*, Sept. 19–23, 2011, U.N. Doc. CRPD/C/ESP/CO/1, 6th Sess., ¶¶ 17–18.

129. Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Periodic Report of Hungary*, Sept. 17–28, 2012, U.N. Doc. CRPD/C/HUN/CO/1, 8th Sess., ¶ 1.

categorized a law permitting abortions in cases of fetal impairment as a form of discrimination.[130] The Committee expressed concern that Hungary's law allows abortion "for a wider circle than in general for the fetuses deemed to have health damage or some disability, thereby discriminating on the basis of disability."[131]

The Committee's comments set off alarm bells among pro-choice feminists, who feared that conservative governments would use the Committee's views as an excuse to restrict access to abortion. In 2013, the Center for Reproductive Rights ("CRR") submitted commentary to the Committee as part of its "half-day discussion" on women and girls with disabilities.[132] The CRR pointed out that the Committee's comments to Spain and Hungary could undermine efforts by the other UN human rights treaty bodies to persuade governments to liberalize abortion laws and reduce the incidence of illegal and unsafe abortions, which contribute to maternal mortality.[133]

Subsequent events in Spain demonstrate that the CRR had good reason to be concerned. In 2013, the government, led by the conservative Popular Party, proposed to enact a bill prohibiting abortion in most circumstances, including cases of fetal impairment.[134] Had the bill been enacted, the bill would have reversed prior law reform and reinstated one of the most significant restrictions on abortion in Europe.[135] The refusal to include an exception for cases of fetal impairment—which appeared to be a response to the Committee's comments—was particularly controversial and generated opposition even among members of the ruling party.[136] In the end, massive opposition compelled the Spanish government to withdraw the proposed legislation.[137]

The apparent reaction of the Spanish government to its recommendations, together with commentary from feminists, appears to have caused the

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130. *Id.* at ¶¶ 17–18.

131. *Id.*

132. *Center for Reproductive Rights: Submission to the Committee on the Rights of Persons with Disabilities,* Half Day of General Discussion on Women with Disabilities, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD2013.aspx (accessed by clicking submission 24).

133. *Id.* at 9.

134. Petersen, *supra* note 22, at 155–158 (providing analysis of the Spanish government's proposal).

135. Ashifa Kassam, *Thousands of Pro-Abortion Protesters Gather in Spain*, THE GUARDIAN (Feb. 1, 2014), https://www.theguardian.com/world/2014/feb/01/thousands-pro-abortion-protesters-spain-madrid.

136. Guy Hedgecoe, *Spain's Abortion Legislation 'Changed After Protests'*, IRISH TIMES (June 24, 2014, 1:00 AM), https://www.irishtimes.com/news/world/europe/spain-s-abortion-legislation-changed-after-protests-1.1842594.

137. Ashifa Kassam, *Spain Abandons Plan to Introduce Tough New Abortion Laws*, THE GUARDIAN (Sept. 23, 2014, 6:16 PM), https://www.theguardian.com/world/2014/sep/23/spain-abandons-plan-introduce-tough-new-abortion-laws.

Committee on the Rights of Persons with Disabilities to reconsider the relationship between disability rights and access to abortion. Although the Committee continues to condemn situations in which women are pressured to have an abortion, it has clarified that it also does not support laws that would force a woman to carry a pregnancy to term. For example, in 2017, the Committee critiqued the British law of abortion, stating:

> [t]he Committee is concerned about perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment. The Committee recommends that the State party amend its abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency.[138]

Implicitly, the Committee was calling upon the British government to give women the right to terminate a pregnancy without having to rely upon certain "exceptions" in the law that tend to devalue persons with disabilities and to repeal the unequal time limits, which currently allow much later abortions in cases of fetal impairment.[139] While this recommendation is somewhat nuanced, it would be hard for a government to interpret it as endorsement for criminalizing abortion.

This position became even more clear in the summer of 2018, when the Committee on the Rights of Persons with Disabilities issued a Joint Statement with the Committee on the Elimination of Discrimination Against Women.[140] The statement emphasized that: "[a]cess to safe and legal abortion . . . are essential aspects of women's reproductive health and a pre-requisite for safeguarding their human rights to life, health, equality before the law, non-discrimination, information, privacy, bodily integrity, and freedom from torture and ill treatment."[141] Thus, governments "should decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, including women with disabilities."[142] This statement makes clear that the two Committees do not believe the phenomena of sex-selective and disability-selective abortion should be used to justify coercing women to carry pregnancies to term. Rather, governments should

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138. Concluding Observations on Initial Report of the UK, paras. 12–13, U.N. Doc. CRPD/C/GRB/CO/1 (2017).

139. *Id.* For additional analysis of British law, *see* THE COMMISSION OF INQUIRY, PARLIAMENT, PARLIAMENTARY INQUIRY INTO ABORTION ON THE GROUNDS OF DISABILITY (2013), *available at* https://dontscreenusout.org/wp-content/uploads/2016/02/Abortion-and-Disability-Report-17-7-13.pdf.

140. Joint Statement, Comm. on the Rts. of Persons with Disabilities & Comm. on the Elimination of Discrimination Against Women, *Guaranteeing Sexual and Reproductive Health and Rights for all Women, in Particular Women with Disabilities* (Aug. 29, 2018), *available at* https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements. aspx.

141. *Id.*

142. *Id.*

address "the root causes of discrimination against women and persons with disabilities" and provide "support to parents of children with disabilities."[143]

The two Committees recommend repealing abortion laws that "perpetuate deep rooted stereotypes and stigma," which is almost certainly a reference to laws that make it easier to terminate a pregnancy in cases of fetal impairment, such as the British law.[144] However, it is clear from the remaining parts of the Joint Statement that the Committees are not recommending law reform in the direction that was proposed by the Spanish government. Rather, the two treaty-monitoring bodies are proposing full decriminalization of abortion and allowing each woman to make her own, very personal, decision on whether to carry a pregnancy to term.

When the Joint Statement was issued, the Chairperson of the Committee on the Rights of Persons with Disabilities made the following comment: "I am very concerned that opponents of reproductive rights and autonomy often actively and deliberately refer to disability rights in an effort to restrict or prohibit women's access to safe abortion . . . This constitutes a misinterpretation of the Convention on the Rights of Persons with Disabilities."[145] This comment and the Joint Statement of the two Committees are timely because certain organizations have previously cited the CRPD as support for criminalizing abortion.[146] If the Supreme Court eventually agrees to review a statute that prohibits abortion when sought for particular reasons then we can certainly expect the discourse of equality, eugenics, and disability rights to be argued even more strenuously before the Court. But one hopes that the women's movement and the disability rights movement can find ways to work together to promote equality without restricting reproductive autonomy.[147]

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143. *Id.*

144. *Id.*

145. Office of the High Commissioner on Human Rts, Press Release, *Stop Regression on Sexual and Reproductive Rights of Women and Girls, UN Experts Urge* (Sept. 5, 2018) (quoting Theresia Degener, Chairperson of the U.N. Committee on the Rights of Persons with Disabilities).

146. *See e.g.* Olivia Summers, *Eugenic Selective Abortion-An Affront to Humanity* (2016), https://aclj.org/pro-life/eugenic-selective-abortion——an-affront-to-humanity.

147. *See, e.g.* CTR FOR REPRODUCTIVE RIGHTS, *supra* note 46; Saxton, *supra* note 39 (both *supras* citing examples of how the two movements can work together).